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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Western Family Foods, Inc.

Serial No. 78745688

David P. Cooper of Kolisch Hartwell, P.C. for Western Family Foods, Inc.

Gina Fink, Trademark Examining Attorney, Law Office 109 (Dan Vavonese, Managing Attorney).

Before Quinn, Grendel and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Western Family Foods, Inc. has applied to register on the Principal Register the mark POOCH WRAPS in standard characters for "dog food and pet treats" in International Class 31.¹

The trademark examining attorney has refused registration under Section 2(e)(1) of the Trademark Act on

¹ Application Serial No. 78745688 was filed on November 2, 2005, based on applicant's assertion of its bona fide intent to use the mark in commerce on the recited goods.

the ground that applicant's mark is merely descriptive of a feature or quality of applicant's goods.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed main briefs and applicant filed a reply brief.

Evidentiary Issues

Before turning to the substantive ground for refusal, we note that applicant has submitted three exhibits with its main brief. Exhibit A consists of materials that previously were made of record by applicant during prosecution of the involved application. As such, the materials comprising Exhibit A are at best duplicative and cumulative of evidence timely made of record, and thus need not and should not be resubmitted. See *Life Zone, Inc. v. Middleman Group, Inc.*, ___USPQ2d___, (TTAB July 15, 2008).

Exhibit B consists of the following dictionary definition of POOCH: "to bulge; protrude. Used with *out*: "a little roll of flab that pooches out above the tight waists of their spandex trunks" (Megan Rosenfeld, *Washington Post* March 25, 1992).² We hereby take judicial notice of this definition.³

² *The American Heritage Dictionary of the English Language*, (4th Ed. 2000), retrieved from the Internet website Bartleby.com.

³ The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB

Exhibit C assertedly consists of copies of third-party registrations and applications that were not previously made of record. We agree with the examining attorney that the materials comprising Exhibit C submitted with applicant's appeal brief are untimely, and they have not been considered. See Trademark Rule 2.142(d) (the record in the application should be complete prior to the filing of an appeal). We note, in any event, that such materials are illegible in their entirety.

Issue on Appeal

As noted above, the issue on appeal in this case is whether applicant's mark, POOCH WRAPS, merely describes a function, feature or characteristic of the goods recited in the involved application.

Applicant contends that its proposed mark is suggestive for "at least three reasons" (brief, p. 3).

First, consumers will have to think because the mark consists of a phrase that is unfamiliar, or has not been used, with respect to "dog food and pet treats." Consumers will not be familiar with dog food and pet treats being called "POOCH WRAPS." Second, and on a related note, consumers must exercise multi-step reasoning to understand that POOCH WRAPS somehow suggests "dog food and pet treats" because POOCH WRAPS is capable of connoting various products in addition to Applicant's products. Third, POOCH WRAPS is at

2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

least suggestive of "dog food and pet treats" because it is an incongruous use of individually descriptive terms.

Applicant further argues that of the "tens of millions of records available via the Internet, the Examining Attorney has not presented even one descriptive use of "POOCH WRAPS" for Applicant's Class 31 goods." Applicant asserts that the lack of such evidence supports its contention that its mark is suggestive of the recited goods.

In support of its arguments, applicant submitted with its request for reconsideration advertisements from commercial Internet webpages displaying the following designations in connection with goods that differ from those identified in its application: POTTERY BARN KIDS BATH TOWEL DOG WRAP "SAMUEL" for a child's bath wrap; PAWTECTORS DOG LEG WRAPS for waterproof wraps for a dog's legs; SAM'S DOG HUT MALE DOGGIE WRAPS for incontinence pads for male dogs; and MY FAUX PAWS for bathrobes and wraps for small dogs.

The examining attorney maintains that the mark merely describes a feature or quality of the goods. In support of the refusal, the examining attorney has made of record dictionary definitions of POOCH and WRAP. According to

these definitions, POOCH may be defined as "(slang) a dog"⁴ and "WRAP" may be defined, *inter alia*, as "a flatbread, such as a tortilla or lavash, rolled around a filling."⁵

The examining attorney has further made of record advertisements retrieved from Internet webpages displaying the term WRAP used in connection with dog treats. Excerpts from these webpages follow (emphasis added):

Lick Your Chops TREAT-UMMS Fish & Crab **Wraps**
Natural Dog Treats 2.5 oz.
Treat-Umms Dog Treats are the latest addition to the Lick Your Chops family of natural pet products. These unique and innovative hand made dog treats use only the following natural ingredients and nothing else: chicken breast, sweet potato, cheese, crab, rice, liver and codfish. These treats come in unique forms: dumbbells, strips and **wraps**.
(www.herbtrader.com)

Gourmet **Wraps**
Created for the truly health-conscious pet owner. Premium tasty **wraps** made with all-natural ingredients. Glucosamine and chondroitin are added to help keep your dog's joints healthy. Great tasting treat you'll feel good about giving!
(www.valleyvet.com)

Pooch Canada
There's no better way to tell puppy you love him than with a special dog treat. That's why **Pooch** Canada Pet Supplies carries a complete line of yummy dog treats and chews. Chocolick chips, chewy soy dog treats and yummy potato & chicken

⁴ *The American Heritage Dictionary of the English Language*, (4th Ed. 2000), retrieved from the Internet website Bartleby.com.

⁵ *Id.*

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wraps will let your dog know just how special you think he is.
(www.pooch.ca)

Cadet Gourmet Select Sweet Potato & Chicken **Wraps** are nutritious reward treats for dogs that are high in vitamins, minerals and protein. Resealable package helps keep product fresh.
(www.pooch.ca).

Finally, the examining attorney made of record copies of third-party registrations in which the terms POOCH or WRAP are disclaimed in marks on the Principal Register or registered on the Supplemental Register as applied to goods similar to those recited in the involved application.

These registrations include:

Registration No. 2316718 on the Principal Register for the mark POOCH PASSIONS with POOCH disclaimed for "edible treats for dogs and cats;"

Registration No. 2532902 on the Principal Register for the mark HEALTHYPOOCH.COM and design with HEALTHYPOOCH.COM disclaimed for "non-medicated, holistic food and edible treats for cats, dogs, and other pets;"

Registration No. 2841880 on the Supplemental Register for the mark POOCH POPS with POPS disclaimed for "flavored liquid sold in packages to be frozen therein for pets for making pet ice cream; and frozen confections for pets;"

Registration No. 3003238 on the Principal Register for

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the mark POOCH PASTRY SHOP with POOCH disclaimed for
"foodstuffs for animals, namely dog treats;"

Registration No. 2795932 on the Principal Register for
the mark WEENIE WRAPS with WRAPS disclaimed for "extruded,
baked, edible treats for dogs;"

Registration No. 3259608 on the Supplemental Register
for the mark MEATY WRAPS for "dog biscuits;" and

Registration No. 3263577 on the Supplemental Register
for the mark DOGGIE WRAPS for "dog treats."

It is well settled that a term is considered to be
merely descriptive of goods and/or services, within the
meaning of Section 2(e)(1) of the Trademark Act, if it
immediately describes an ingredient, quality, feature or
characteristic thereof or if it directly conveys
information regarding the nature, function, purpose or use
of the goods and/or services. See Section 2(e)(1) of the
Trademark Act, 15 U.S.C. §1052. See also *In re Abcor
Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978).
It is not necessary that a term describe all of the
properties or functions of the goods and/or services in
order for it to be considered to be merely descriptive
thereof; rather, it is sufficient if the term describes a
significant attribute or feature about them. Moreover,
whether a term is merely descriptive is determined not in

the abstract, but in relation to the goods and/or services for which registration is sought. See *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). Thus, "[w]hether consumers could guess what the product is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985).

In the instant case, the evidence made of record by the examining attorney supports a finding that, as applied to applicant's "dog food and pet treats," the term POOCH WRAPS would immediately describe, without conjecture or speculation, a significant characteristic or feature of such goods, namely, that they are treats or food for a dog in the nature of or resembling a flat bread rolled around a filling. The above-referenced dictionary definitions establish that POOCH WRAPS merely describes filled flat breads - WRAPS - intended for use as food or a treat for a dog - or POOCH. Applicant's goods are "dog food and pet treats." Thus, as defined, POOCH WRAPS merely describes a central function, feature or characteristic of the recited goods.

In addition, the Internet advertisements submitted by the examining attorney establish that various entities use the term WRAPS to describe their pet food and pet treats. As such, this evidence supports a finding that consumers

are accustomed to encountering the term WRAPS as used to describe pet food and treats. Material obtained from the Internet is acceptable in ex parte proceedings as evidence of potential public exposure to a term. See *In re Fitch IBCA, Inc.*, 64 USPQ2d 1058 (TTAB 2002).

Finally, the third-party registrations submitted by the examining attorney demonstrate that the terms POOCH and WRAPS are subject to a disclaimer requirement or registration on the Supplemental Register in the context of various marks applied to pet food and pet treats. It is settled that each case must be decided on its own set of facts, and we are not privy to the facts involved with these registrations. See *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). See also *In re Best Software Inc.*, 58 USPQ2d 1314 (TTAB 2001). Nonetheless, these third-party registrations tend to provide further support for the examining attorney's position that POOCH WRAPS is merely descriptive in the context of applicant's goods.

We are not persuaded by applicant's argument that consumers encountering POOCH WRAPS must engage in a multi-step analysis to understand that such designation merely describes dog food and treats that resemble wraps. We note applicant's statement that its mark comprises "individually

descriptive terms" (brief, p. 3), but are not we persuaded that POOCH WRAPS is incongruous as applied to applicant's goods which, as identified, would include edible wraps for dogs. While a combination of descriptive terms may be registrable if the composite creates a unitary mark with a separate, nondescriptive meaning, *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968), the mere combination of descriptive words does not necessarily create a nondescriptive word or phrase. See *In re Associated Theatre Clubs Co.*, 9 USPQ2d 1660, 1662 (TTAB 1988). If each component retains its descriptive significance in relation to the goods or services, the combination results in a composite that is itself descriptive. See *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004). Based upon the evidence of record, we find that POOCH WRAPS immediately describes a feature or characteristic of applicant's goods, namely, that they are treats for a pooch in the shape of a wrap.

Further, we are unpersuaded that because the terms comprising applicant's mark have other meanings unrelated to its goods, POOCH WRAPS is not merely descriptive of its "dog food and pet treats." As noted above, whether a term is merely descriptive is determined not in the abstract,

but in relation to the goods and/or services for which registration is sought. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, supra.*

Moreover, we are not persuaded by applicant's argument that because POOCH WRAPS has not previously been used in connection with "dog food and pet treats," consumers are unlikely to view the designation as merely describing such goods. The above evidence demonstrates that the combination of the descriptive terms POOCH and WRAPS merely describes applicant's goods, and that consumers have been exposed to descriptive use of the individual terms comprising applicant's mark in connection with related goods. Thus, even if applicant is the first and/or at present the only intended user of the term POOCH WRAPS in connection with "dog food and pet treats," it is well settled that such intended use does not entitle applicant to the registration thereof where, as here, the term has been shown to immediately convey only a merely descriptive significance in the context of applicant's goods. *See, e.g., In re National Shooting Sports Foundation, Inc.*, 219 USPQ 1018, 1020 (TTAB 1983); and *In re Mark A. Gould, M.D.*, 173 USPQ 243, 245 (TTAB 1972). For the same reasons, we are not persuaded that the absence in the record of this

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case of Internet evidence showing descriptive use of POOCH WRAPS compels a finding that the mark is suggestive of applicant's goods. As noted above, applicant is not entitled to registration of a merely descriptive term simply by virtue of being the first intended user thereof. *See Id.*

Finally, we note that applicant's analysis is supported by very little evidence. All applicant has provided is argument regarding what a proposed purchaser would conclude when confronted with applicant's mark. *See In re Vsesoyuzny Ordena Trudovogo Krasnogo Znameni*, 219 USPQ 69, 70 (TTAB 1983) (assertions in briefs are not evidence). *See also In re Minnetonka*, 212 USPQ 772, 777 (TTAB 1981) (determining whether a mark has acquired distinctiveness is based on the facts as they exist and are revealed by the evidence in the record at the time the application is acted upon).

Accordingly, we find that applicant's mark is merely descriptive as contemplated by Section 2(e)(1) of the Act.

Decision: The refusal to register is affirmed.